Petition

81-1764

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RONALD EDGAR VEATCH,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a District Court can place full reliance on a written government psychiatric report (almost one year old) in determining competency to stand trial and thus deny a criminal defendant an opportunity to cross-examine the doctors who made the report and to present evidence of his own as to his mental condition?

2. Whether the contents of a billfold found in a motor vehicle after a criminal defendant had exited the vehicle are protected against searches and seizures without probable cause?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

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IN THE

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OCTOBER TERM, 1981

NO. _____

RONALD EDGAR VEATCH,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A writ of certiorari is respectfully sought to review the Court of Appeals' judgment affirming the conviction of Petitioner for violation of 18 U.S.C 2314 and denying his petition for rehearing.

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals for the Ninth Circuit appears in Appendix A to this Petition and is reported at 647 F.2d 995 (9th Cir. 1981). The Order of the Court of Appeals denying a Petition for Rehearing appears in Appendix B. The Judgment of the District Court was not reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 12, 1981. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 4, 1982. The jurisdiction of this Court is invoked under Title 23 U.S.C. §1254(1), §1651, and §2106, and Rule 37(c) of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides in relevant part as follows:

> "The right of the people to be secure in their...papers, and effects, against unreasonable searches and seizures, shall not be violated,..., but upon probable cause...."

2. The Fifth Amendment to the Constitution of the United States provides in relevant part as follows:

> "No person shall...be deprived of...liberty..., without due process of law...."

3. The Sixth Amendment to the Constitution of the United States provides in relevant part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...."

STATEMENT OF THE CASE

This case originated from charges brought against Petitioner in the United States District Court for the District of Arizona for violation of Title 18 U.S.C. §2314.

Petitioner was stopped by Arizona state police pursuant to a federal warrant issued for Petitioner as a material witness. After he was out of his automobile and in custody, one of the troopers entered Petitioner's vehicle and discovered a wallet laying on the back seat of the car. After taking possession of the wallet and before any warnings had been administered to Petitioner, inquiry was made of him as to the wallet and Petitioner "indicated it must have been his brother's wallet, and left it in the car in Phoenix, or something to that effect." A search of the wallet was

subsequently made without a warrant and a receipt contained therein was ultimately admitted into evidence at the trial of Petitioner over Petitioner's objection. The receipt was critical to the Government's connecting Petitioner to the offense.

The District Court found the search of the vehicle and the billfold to be incident to an arrest and the contents of the billfold were admitted into evidence.

At the time of trial, Petitioner, by and through his attorneys, sought to obtain a hearing as to whether Petitioner was competent to stand trial. A hearing on the issue of competency was denied by the District Court and was predicated upon the evidence of a report made by a Government psychiatrist almost a year earlier, pursuant to an order entered in accordance with Title 18 U.S.C. §4244.

Petitioner was allowed to file an offer of proof which showed not only a long history of psychiatric and emotional disturbances but also the existence of such a condition at the time of trial.

REASONS FOR GRANTING THE WRIT

A review of the decision of the Court of Appeals for the Ninth Circuit is sought because it is in conflict with decisions of the Court of Appeals for the Tenth Circuit as to the necessity for a hearing on competency and further the certainty of the law of search and seizure applicable to this case remains unresolved.

I. Conflict of Circuit Courts of Appeals on Necessity for Competency Hearing

A conflict exists among the Circuit Courts of Appeals in the application of Bishop v. United States, 361 F.2d 961, (1956), Pate v. Robinson, 383 U.S. 375,

(1966), and Drope v. Missouri, 420 U.S. 162, (1960), when a criminal defendant has been found to be competent after an examination by a government doctor ordered pursuant to Title 18 U.S.C. §4244.

The Court of Appeals for the Tenth Circuit, we think properly so, announced in Butler v. United States, 361 F.2d 869, (10th Cir. 1966), that an evidentiary hearing must be held once the issue of mental competency is raised and that a finding of competency by a government doctor does not preclude or avoid the necessity for a competency hearing.

> "The district court sought to avoid the effect of those decisions by holding that the files and records of the case show conclusively that the motion is without merit. This result places full reliance on the written report of the Springfield doctors. The appellant is entitled to an opportunity to cross-examine those doctors and to present evidence of his own as to his mental condition." Butler, supra, 361 F.2d at 870.

The Court of Appeals for the Ninth Circuit in this case reached the opposite conclusion. Petitioner was denied an opportunity to cross-examine the Springfield doctors as to the basis for their conclusion that he was competent to stand trial, or at least was about a year earlier, and was further denied the opportunity to present evidence of his own as to his mental condition. The offer of proof filed by Petitioner's attorneys reflects a history of Petitioner's mental disorders since childhood and the twelve reports of nine psychiatrists indicates Petitioner's incompetence during various periods of time, including the date of trial. There is no question that this offer of proof meets the threshold requirements of Drope requiring the Court to make further inquiry into the question of

the Petitioner's competence to stand trial.

As there is a conflict within the Circuit Courts of Appeals on this important question of whether a criminal defendant is entitled to the due process requirements of confrontation and cross-examination in a hearing to determine the critical question of his competency to stand trial, this Court should grant Petitioner's Writ for Certiorari.

II. Applicability of the Law of Search and Seizure

The decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with the decisions of this Court in United States v. Chadwick, 433 U.S. 1, (1977), Arkansas v. Sanders, 442 U.S. 753, (1979), Robbins v. California, ___ U.S. ___, 101 S.Ct. 2841, (1981) as to the necessity for securing a warrant for the

search of a wallet found inside a motor vehicle; the wallet having been reduced to the exclusive control of the officers, thus no longer an incident of the arrest. In United States v. Chadwick, supra, this Court held:

> "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, there is no longer any danger that the arrestee might gain access to the property to see the weapon or destroy evidence, a search of that property is no longer an incident of arrest." (Footnote omitted) 433 U.S. at 15.

In Arkansas v. Sanders, supra, this Court held:

> "A lawful search of luggage generally may be performed only pursuant to a warrant... luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." 442 U.S. at 762.

Furthermore, this Court in Robbins v. California, supra, has held:

> "[A] closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." 101 S.Ct. at 2845.

Petitioner would submit that a wallet has an even greater expectation of privacy than does a piece of luggage and should be equally protected by the Constitution. As in both Chadwick and Sanders, there was not the slightest danger in this case that the luggage (wallet) or its contents could have been removed before a valid search warrant could have been obtained. Thus the failure to obtain a search warrant for constitutionally protected containers of personal effects constitutes an unreasonable search and seizure prohibited by the Fourth Amendment.

The Court of Appeals completely avoided the question of the protection to be afforded to a wallet by holding that the Petitioner had "abandoned" the wallet. Although the Court of Appeals' opinion seems to subscribe different and varying interpretations of the meaning of "abandonment", Petitioner would submit that abandonment is no more than a finding that the complainant lacked a reasonable expectation of privacy as required by this Court's opinions in Rakas v. Illinois, 439 U.S. 128, (1978) and United States v. Salvucci, 448 U.S. 83, (1980). It is clear that the Petitioner had a reasonable expectation of privacy in his automobile and all parties concede that the Petitioner was the owner of the automobile and freely admitted to that ownership. With all due respect to the Court of Appeals, the Petitioner did not deny a

reasonable expectation of privacy as to the automobile or its contents and the record is wholly unclear as to whether there was any denial of ownership of the wallet at all. Petitioner admitted that he carried large sums of money and, therefore, had a need to carry the handgun which was also found within the vehicle. Further, the wallet contained some $4,000.00 which was turned over to the Petitioner. As to any denial of ownership the following exchange occurred during the trial of Petitioner:

> "Q. (by Prosecutor Fields): All right. Did you have occasion to ask the Defendant about the wallet that was in the back seat?
>
> A. (by Officer): Yes sir. I brought it out thinking it was his for him to take with him, and he indicated that it was, something about --"

At that time an objection was entered that any statement made was made during

the time in which the Petitioner was in custody and it is clear from the record that Petitioner had not been given any Miranda warnings. Despite this and despite the fact that Petitioner was not free to go, the Court overruled those objections and allowed the witness Officer Atwater to testify as follows:

> "MR. FIELDS: Do you remember the question?
>
> THE WITNESS: What statements he may have made, yes, sir. He indicated it must have been his brother's wallet, and left it in the car in Phoenix, or something to that effect."

Petitioner would submit that there is nothing in this testimony to indicate the denial of any interest in the wallet so as to abandon or forego any reasonable expectation of privacy. Although it is not clear as to whether or not the wallet belonged to either Petitioner or to his brother, particularly in light of the

uncertainty that the officer expressed and readily admitted, even if the wallet did belong to Petitioner's brother, he would have a reasonable expectation to privacy in that he would have obviously have wanted to return the wallet to his brother and, therefore, the bailment or other legal relationship (the nature of which is not wholly important) would have remained in the expectation of ownership to the point of returning it to his brother in the expectation of privacy in the preservation of the wallet and its contents so as to safely deliver it to his brother, all were present even under the theory that it was his brother's wallet, and all add up to a reasonable expectation of privacy in the wallet whether it belonged to the Petitioner or his brother. There was no indication of any attempt to discard the wallet or

dispose of its contents. Rawlings v. Kentucky, 448 U.S. 98, (1980). Quite to the contrary, Officer Atwater testified that the wallet was in plain view on the seat of the car and it is reasonable to believe that it came out of the pocket of the Petitioner as he exited the car.

Since this Court has not decided specifically that a wallet is entitled to the same constitutional protection as a repository for personal effects, as was luggage in Arkansas v. Sanders and a footlocker in United States v. Chadwick, the Petitioner would respectfully submit that this Court should grant Petitioner's Writ of Certiorari and resolve this important question of constitutional law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue to review the

Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald E. VEATCH,
Defendant-Appellant,

No. 80-1567

United States Court of Appeals,
Ninth Circuit

Argued and Submitted March 11, 1981

Decided June 12, 1981

Appeal from the
United States District Court
for the District of Arizona

Before KILKENNY and SNEED, Circuit Judges, and GRANT*, District Judge.

GRANT, District Judge.

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*Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana, is sitting by designation.

Appellant Ronald E. Veatch appeals from a conviction for transporting property obtained by fraud in interstate commerce in violation of 18 U.S.C. § 2314.[1] He raises the following issues:

1. Whether the district court erred in denying his motion to suppress certain evidence?

2. Whether the district court erred in denying his motion for an evidentiary hearing on the question of his competency to stand trial?

3. Whether the district court erred in refusing to allow him to introduce evidence supporting a defense of insanity?

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[1] 18 U.S.C. § 2314 provides in pertinent part that:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more;
>
> * * * * * * * * * * * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than 10 years, or both."

4. Whether the district court erred in conducting a hearing on pretrial motions in chambers without his presence?

5. Whether the district court's denial of his motion for a continuance following the death of the father of one of his attorneys resulted in him being denied effective assistance of counsel?

FACTS

On September 1, 1978, Veatch, using the alias Frank Caven, purchased by check a diamond faced gold watch from a jewelry store in Fort Worth, Texas. Before accepting the check for $6,850, a store salesman and bookkeeper apparently verified that the check would clear by calling a telephone number supplied by Veatch and speaking with a Mr. Doss, whom Veatch claimed to be his banker. The store representatives were satisfied and accepted the check.

On September 4, 1978, Veatch purchased, through two associates, two gold and diamond rings from the same jewelry store. Payment of $8,000 was again made by check. The same salesman as in the earlier transaction accepted the check, but this time without verification for the reason that the banks were closed due to a holiday. Both checks were returned for lack of sufficient funds.[2]

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[2]After the second fraudulent transaction occurred, the salesman was able to contact the real Mr. Doss who was a banker but who had never known Veatch. Both the salesman and bookkeeper positively identified Veatch as the purchaser of the watch and two rings.

On November 1, 1978, the FBI in Phoenix, Arizona, learned that Veatch was associated with the Days Inn Motel in that city. The manager of the motel, Don Lindquist, after being advised of Veatch's background, told the FBI that Veatch was at that moment en route to Phoenix from Williams, Arizona, in a blue Cadillac limousine. Later that same day, officers from the Arizona Department of Public Safety, Highway Patrol, spotted the vehicle. Veatch and two other persons in the vehicle all stepped out peacefully. One of the officers noticed in the vehicle both a handgun and a wallet which had been slightly wedged between the bottom and backrest portions of the back seat where Veatch had been sitting. Both the weapon and the wallet were in plain view. When asked by the officer if the wallet were his and whether he wanted to take it with him, Veatch denied any ownership or interest in the same. The officer then proceeded to examine the contents of the wallet and discovered the sales receipt for the watch obtained in Texas.

The two other occupants of the limousine returned the vehicle to Lindquist. He had been advised by the vehicle's seller that Veatch had purchased it with a fraudulent check. Before repossession of the vehicle, Lindquist removed some of Veatch's belongings including an Arizona bank pouch containing the watch and one of the rings. All of these items were then placed in a briefcase and left in Veatch's room. On November 2, 1978, when it became apparent that Veatch was going to remain in jail, Lindquist removed all of Veatch's belongings from his room so that it could be available for rental.

On the following day, November 3, 1978, after learning of the FBI's investigation, Lindquist delivered all of Veatch's belongings, including the watch and two rings, to the FBI.[3] This action, however, was contrary to Veatch's instructions. He had advised Lindquist to give the belongings to his lawyer.

On February 5, 1979, Veatch filed a motion for a determination of his competency to stand trial. The Government expressed no objection, and the motion to have Veatch examined pursuant to 18 U.S.C. § 4244 was granted. Veatch was transferred to Springfield, Missouri, for the examination and was returned from Springfield in July, 1979, with a finding that he was competent even though very uncooperative.

Veatch was released on bond on August 15, 1979, but failed to appear for trial on December 4, 1979. He was subsequently arrested in Oklahoma. The trial of the original charge was then rescheduled and began on June 26, 1980. On the day of trial, Veatch filed a second motion for a determination of his competency to stand trial. He also filed a notice of intention to rely upon the defense of insanity. The district court refused to permit Veatch to raise the insanity defense because of an untimely filing of the notice pursuant to Fed.R.Crim.P. 12.2(a) and the Rules of Practice for the District Court for the

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[3]The second fraudulently obtained ring was already in Lindquist's possession having been given to him by Veatch three days before Veatch's arrest. Lindquist believed that the ring was given to him as a gift since Veatch said he didn't like it and it didn't fit well.

District of Arizona. Veatch's oral motion for permission to show cause for his untimely filing was denied. The court also concluded, based upon the case file, the various opinions of the psychiatrists, and the Springfield report and finding, that Veatch was competent to stand trial and that an evidentiary hearing would be unnecessary. Veatch's supplementary motion for a continuance to allow the Government time to prepare a rebuttal to the insanity defense was likewise denied. In addition, Veatch moved the court to suppress any use by the Government of the watch, two rings and sales receipt at trial. That motion was denied.

SUPPRESSION OF EVIDENCE

At trial, the two rings, watch and sales receipt were all admitted into evidence over Veatch's objections. He contends that all of the items were unlawfully seized without a warrant. We disagree.

The sales receipt was found by the police officer in the wallet lodged in the back seat of the limousine where Veatch had been sitting. The officer opened the wallet and searched its contents after Veatch denied ownership when the officer asked him if it belonged to him. The Government contends that Veatch has no standing to challenge the search of the wallet because he had voluntarily abandoned it.

In United States v. Jackson, 544 F.2d 407 (9th Cir. 1976), this court held that if a person has voluntarily abandoned property, he has no standing to complain of its search or seizure. The basis of the principle is that upon abandonment, the party loses a legitimate expectation

of privacy in the property and thereby disclaims any concern about whether the property or its contents remain private.[4] The difficult question is what actions constitute an abandonment of property. In Jackson, the court stated:

> "Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. [cites omitted]. Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search."

544 F.2d 409.[5]

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[4]In Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the Supreme Court replaced the concept of standing with the concept of a "legitimate expectation of privacy." The Court stated: "But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." 439 U.S. at 139, 99 S.Ct. at 428. The Court made clear that its decision only affected terminology and not substance when it stated that "[t]he inquiry under either approach is the same." Id. (footnote omitted). The principles and holding of Jackson are thus left unaffected.

[5]In United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973) (en banc), the court provided the following definition of abandonment:

The issue, therefore, is whether Veatch's denial of ownership and interest in the wallet constitutes an abandonment of property. We find that it does.

In United States v. Cella, 568 F.2d 1266, 1283 (9th Cir. 1977), the court summarized some of the acts which had been found to constitute abandonment and specifically noted Jackson, characterizing the act in that case as:

> "[A] denial of ownership when questioned, even if the defendant is seen previously in possession of the item..."

568 F.2d at 1283. Accord, United States v. Canady, 615 F.2d 694, 696-97 (5th Cir.), cert. denied, U.S. , 101 S.Ct. 165, 66 L.Ed.2d 78 (1980); United States v. Miller, 589 F.2d 1117, 1131 (1st Cir. 1978), cert. denied, 440 U.S. 958, 99 S.Ct. 1499, 59 L. Ed.2d 771 (1979); United States v. Anderson, 500 F.2d 1311, 1318 (5th Cir. 1974);

> "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. [cite omitted]. All relevant circumstances existing at the time of the alleged abandonment should be considered. [cite omitted]. Police pursuit or the existence of a police investigation does not of itself render abandonment involuntary. [cites omitted]. The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search."

United States v. Colbert, 474 F.2d 174, 176-77 (5th Cir. 1973)(en banc). See also Lurie v. Oberhauser, 431 F.2d 330, 333 (9th Cir. 1970). The facts of the present case fall well within the holdings of these cases. Veatch expressly disclaimed ownership of the wallet to the officer. This left him with no reasonable expectation of privacy in the wallet and he cannot now object to its search. The district court's denial of Veatch's motion to suppress the sales receipt on the grounds that it was abandoned is affirmed.

The second suppression issue raised by Veatch concerns the watch and two rings which were given to the FBI by Lindquist.[6] Veatch contends that the FBI should have secured a search warrant before receiving these items. The Government contends that Lindquist's actions were voluntary and private, and absent some type of FBI involvement, the items were lawfully received.

The central question surrounding this matter is whether Lindquist, "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state" when he obtained Veatch's property and gave it to the FBI. Coolidge v. New Hampshire, 403 U.S. 443,

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[6]One of the rings was given to Lindquist as a gift by Veatch just three days prior to his arrest. Veatch had no possessory interest in that ring whatsoever and his claim that the FBI should have obtained a warrant before receiving it is totally meritless. The court will, therefore, limit its analysis only to the ring and watch which Lindquist retrieved from the limousine.

487, 91 S.Ct. 2022, 2049, 29 L.Ed.2d 564 (1971). This court has held "[a] private search in which the government is in no respect involved—either directly as a participant or indirectly as an encourager—is not subject to the Fourth Amendment because the private actor is motivated in whole or in part by a unilateral desire to aid in the enforcement of the law." United States v. Gumerlock, 590 F.2d 794, 800 (9th Cir.)(en banc), cert. denied, 441 U.S. 948, 99 S.Ct. 2173, 60 L.Ed.2d 1052 (1979). See also United States v. Gomez, 614 F.2d 643, 645 (9th Cir. 1979); United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976)(en banc). In United States v. Stevens, 601 F.2d 1075, 1080 (9th Cir.), cert denied, 444 U.S. 917, 100 S.Ct. 232, 62 L.Ed.2d 172 (1979), the court stated that "[a] mere purpose to assist the government is not sufficient in and of itself to convert a private actor into a government actor."

In Sherwin, supra, 539 F.2d at 6, the court stated that:

> "A private person cannot act unilaterally as an agent or instrument of the state; there must be some degree of governmental knowledge and acquiescence. In the absence of such official involvement, a search is not governmental. [cites omitted]. And once a private search is completed, the subsequent involvement of government agents does not retroactively transform the original intrusion into a governmental search."

The evidence in this case supports the district court's ruling that Lindquist's actions were purely private and not instigated by or participated in by the FBI.

Lindquist removed Veatch's belongings from the limousine and placed them in Veatch's room. Lindquist later removed the items so that the room could be rented. These actions occurred without the knowledge or acquiescence of the FBI. When questioned by the FBI, Lindquist volunteered the information that he was in possession of the watch and rings. The FBI did not request or suggest that the items be transferred to them. Turning over the items to the FBI was the result of Lindquist's own decision. The fact that the items were turned over to the FBI in contravention of Veatch's direction has no bearing to this decision. Therefore, in light of the fact that the FBI neither participated in, encouraged or coerced Lindquist, we affirm the district court's holding that the FBI was not required to obtain a warrant before receiving the watch and rings from Lindquist.

EVIDENTIARY COMPETENCY HEARING

On the day of trial, Veatch moved for an evidentiary hearing to determine his competency to stand trial. This motion was denied based upon the findings from the examination conducted in Springfield, Missouri, which declared Veatch competent to stand trial,[7] and the district judge's

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[7]Veatch was examined pursuant to 18 U.S.C. § 4244 which provides in part:

> "Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against

observation and study of Veatch throughout the case. At the invitation of the court, Veatch submitted an offer of proof on this issue. The primary evidence is a report by Dr. David Gurland, who had conducted a mental examination of Veatch just one day before trial. Dr. Gurland concluded that Veatch was incompetent to stand trial. The offer also cites Veatch's long history of emotional and mental problems and the fact that he had been found incompetent to stand trial on at least one previous occasion.

In Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975),

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> the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court.
>
> * * * * * * * * * * * * *
>
> If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto."

the Supreme Court held that a trial court has a duty to insure that a defendant not be subjected to trial if his "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." In Spikes v. United States, 633 F.2d 144, 146 (9th Cir. 1980), this court noted that the standard of competence to plead guilty is different from the standard to stand trial, stating that:

> "The standard of competence to stand trial is the ability to understand the nature of the proceedings in which one is engaged and to assist in one's defense."

See also Chavez v. United States, 641 F.2d 1253 (9th Cir. 1981); United States v. Clark, 617 F.2d 180 (9th Cir. 1980); de Kaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976)(en banc), cert. denied, 429 U.S. 1075, 97 S.Ct. 815, 50 L.Ed.2d 793 (1977).

In this case, the district court ordered a psychiatric examination of Veatch, pursuant to 18 U.S.C. § 4244. The statute provides that a hearing is required "[i]f the report of the psychiatrist indicates a state of present insanity or...mental incompetency in the accused." In Chavez, supra, at 1257, the court stated:

> "A hearing is not required, on the basis of the section 4244 motion alone, if the psychiatrist's report does not indicate present incompetence. [cite omitted]. A judicial determination of competence or incompetence is required after the mandatory psychiatric examination, regardless of the content of the

report."

(emphasis added).

The psychiatric examination conducted in Springfield, Missouri, found Veatch to be "competent and responsible for his actions." Therefore, the district court was not required to hold a hearing on that question. The issue raised by Veatch in this appeal is whether this district court, although not required to conduct an evidentiary hearing, nevertheless erred by not conducting one in this instance based upon all of the facts and circumstances before it.

Whether a hearing is required depends upon the facts of the particular case. United States v. Caplan, 633 F.2d 534, 539 (9th Cir. 1980); Clark, supra, 617 F.2d at 184. In Clark, thecourt held that when a defendant, committed as incompetent under 18 U.S.C. §§ 4244, 4246, is later declared competent and returned to the court, a second competency hearing is not automatically required before criminal proceedings on the issue of guilt can be resumed. The task of the court is to determine whether there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. Caplan, supra, 633 F.2d at 539. Evidence is "substantial" if it raises a reasonable doubt about the defendant's mental competency to stand trial. Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972). In Chavez, supra, at 1257, citing United States v. Cook, 418 F.2d 321 (9th Cir. 1969), this court stated that "[a]fter the first mandatory section 4244 examination and determination, it is in the district court's discretion to grant or deny

subsequent motions for psychiatric examination."

In Caplan, the court discussed some of the factors to be weighed in the process:

> "As we indicated in our review of the evidence in Clark, evidence of past incompetency may be relevant in determining a defendant's present competence to stand trial.
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> "Of course, the probative value of past reports may dissipate over time. The court, therefore, having received a report of present competence, must reassess the quality of the past evidence. It should consider, inter alia, the detail and thoroughness of the prior reports, the seriousness of illness reported, and the prognosis, if any, for future recovery. [cite omitted]. Besides past reports, other factors for consideration could include the time elapsed for treatment, the opportunity to study the defendant during the time of treatment or commitment, and the court's own observation of the defendant. Although the ultimate report in which the defendant is found competent may often be the most probative information, that report must be carefully evaluated and weighed in light of the importance given to all other relevant indicia of the defendant's present mental health."

633 F.2d at 539-40.

After reviewing the entire record that was before the district court and the

offer of proof submitted by Veatch, we conclude that the district court did not err in denying Veatch's motion for an evidentiary hearing on the question of competency. There is no question that Veatch's medical history shows a person who has experienced mental and emotional difficulties during much of his life. That entire history, however, was before the psychiatric staff in Springfield when it declared Veatch competent. The staff had a full opportunity in reaching its conclusion to assess and consider all of Veatch's previous psychiatric treatment. Writing for the entire staff, Dr. Nicola Kunev acknowledged that Veatch's mental history was evaluated. The other major element of Veatch's offer of proof was a report by his psychiatrist, Dr. Gurland. In addition to the examination conducted immediately preceding trial, Dr. Gurland twice examined Veatch in January of 1978 and again in September, 1979. The reports filed then do not substantially differ from the report filed in the offer of proof. Dr. Gurland's early reports were also considered by the staff in Springfield as well as the district court. The offer of proof essentially contains materials of which the staff in Springfield and the district court itself were fully aware and had examined and considered. It fails to raise any reasonable doubt concerning the continued validity of the Springfield report.

The district court denied Veatch's motion based upon the Springfield finding, the opinions of various psyciatrists and its own observations and study of Veatch throughout the case. Although the probative value of the Springfield report must be carefully considered since it was prepared approximately one year before the start of trial, there is nothing in the

offer of proof that diminishes the substantial weight accorded it by the district court. Therefore, we conclude that the district court did not abuse its discretion in denying Veatch's motion for an evidentiary hearing on his competency to stand trial.

PRECLUSION OF INSANITY DEFENSE

In ruling that Veatch could not raise the defense of insanity at trial, the district court relied upon Fed.R.Crim.P. 12.-2(a) which provides as follows:

> "(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate."

Veatch makes two claims. First, that his notice was timely filed. In the alternative, that the district court erred by denying him an opportunity to show cause for the untimely filing and by not granting his motion for a continuance which would allow the Government time to prepare a rebuttal. We reject both claims.

It is within the district court's discretion to grant or deny a defendant relief from the exclusion provision of Rule 12.2(a). See Davis v. United States, 411 U.S. 233, 245, 93 S.Ct. 1577, 1584, 36 L.Ed.2d 216 (1973) (waiver provision of Rule 12(b)(2)). In United States v. Caplan, 633 F.2d 534, 539 (9th Cir. 1980), the court stated the consequences of noncompliance:

> "Had trial counsel intended to interpose an insanity defense on appellant's behalf, he would have been required to notify the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to give such notice, insanity may not be raised as a defense. Rule 12.2, Fed.R.Crim.P. Appellant clearly waived an insanity defense by failing to pursue the determination of his sanity at the time of the offense by psychiatric examination and by failing to comply with Rule 12.2."

Rule 12.2(a) makes abundantly clear that the notice of intention must be filed "within the time provided for the filing of pretrial motions or at such later time as the court may direct...." In this case, the applicable deadline for the filing of the notice was 15 days before trial as provided by Local Rule 11 inasmuch as the court did not expressly direct a later time. Veatch's notice was filed the day trial was to begin. He clearly failed to satisfy Rule 12.2(a)'s timeliness requirement. As this court stated in United States v. Winn, 577 F.2d 86, 89 (9th Cir. 1978):

> "[W]here a Federal Rule of Criminal Procedure indicates that noncompliance with its provisions will constitute a waiver of future objections based on the subject matter of the rule, no relief from waiver is available on review absent a showing of cause and prejudice. [cite omitted]. Rule 12.2 clearly implies that a defendant who fails to comply with its provisions waives his right to raise an insanity defense."
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> * * * * * * * * * * *
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> "The Advisory Committee notes to rule 12.2 make it clear, however, that the purpose of the rule is substantive, not formalistic. It is to give the Government time to prepare to meet a defendant's insanity defense. Once insanity is raised as a defense, the Government must bear the burden of proving sanity beyond a reasonable doubt. [cites omitted]. In view of the significance of this burden, justice requires prior notice to the Government of an insanity defense. Rule 12.2 is designed to insure that both the defendant and the Government have ample opportunity to investigate the facts of an issue critical to the determination of guilt or innocence. [cite omitted]"

We find, therefore, that the district court did not err in precluding Veatch from raising the defense of insanity at trial. With respect to the district court's denial of Veatch's motion to show cause for the untimely filing, we find that this denial does not constitute an abuse of discretion since the causes asserted by Veatch do

not fall within the meaning of Rule 12.-2(a).[8] For these same reasons, we find that the district court did not abuse its discretion in denying Veatch's motion for a continuance.

ABSENCE FROM IN CHAMBERS PRETRIAL CONFERENCE

Veatch contends that his due process rights were violated because of his absence from a pretrial conference in chambers between counsel and the district judge. The conference dealt with a number of matters including Veatch's motion for an evidentiary hearing regarding his competency to stand trial, his oral motion for permission to show good cause for the untimely filing of notice concerning reliance on an insanity defense, and his motion for a continuance to allow the Government adequate time to prepare to rebut the insanity defense. A motion in limine and a motion to suppress evidence were also considered with the latter being decided after an open court hearing with Veatch present.

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[8]Despite this holding, we encourage district courts to at least provide the defendant an opportunity to show cause for an untimely filing of notice. The most appropriate time and place to require an articulation and examination of the cause problem is at the district court level. This will minimize the possibility of a defendant creating "causes" for appeal purposes and will assist this court in reviewing the correctness of a district court's decision.

The first issue this court must address is Veatch's claim that he was excluded from the conference despite his request to be present. The court can find no evidence to support this claim. The only mention of a request to be present concerns presence at a hearing on the insanity defense issue and not presence at the conference itself.

More importantly, this court also finds that absence from the conference, regardless of whether a request to attend was made, does not constitute a violation of due process. Although the right of a defendant to be present at his trial is "ancient and well-established," Badger v. Cardwell, 587 F.2d 968, 970 (9th Cir. 1978), it is not all encompassing or absolute. Id. at 971; Polizzi v. United States, 550 F.2d 113, 1137 (9th Cir. 1976). In Polizzi, supra, 550 F.2d at 1138, the court stated:

> "The Court has said that the existence of a right to be present depends upon a conclusion that absence could, under some set of circumstances, be harmful. Due process does not assure 'the privilege of presence when presence would be useless, or the benefit but a shadow.' Snyder v. Massachusetts, 1934, 291 U.S. 97, 106-07, 54 S.Ct. 330, 332, 78 L.Ed. 674 (Cardozo, J.)."

In Snyder v. Massachusetts, 291 U.S. 97, 107-08, 54 S.Ct. 330, 333, 78 L.Ed. 674 (1934), Justice Cardozo stated that the defendant has a constitutional right to be present at trial "to the extent that a fair and just hearing would be thwarted by his absence, and to that

extent only." And in Faretta v. California, 442 U.S. 806, 819 n.15, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975), the Court stated that the constitution only grants to criminal defendants the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings...." See also United States v. Brown, 571 F.2d 980, 986 n.5 (6th Cir. 1978). The standards set forth by Justice Cardozo in Snyder and the court in Faretta are embodied in Fed.R.Crim.P. 43(c)(3) which provides that the presence of a defendant is not required at a conference or argument upon a question of law.

The matters addressed during the conference in question fall within the scope of Rule 43(c)(3) and the standards enunciated by Justice Cardozo in Snyder and the Court in Faretta. Furthermore, the fairness of the trial was not detrimentally affected by Veatch's absence since he was competently and effectively represented by counsel at the conference. Brown, supra, 571 F.2d at 987. Veatch's presence would have contributed nothing substantial to his opportunity to defend since the matters discussed predominantly involved questions of law. Veatch was not prejudiced and, therefore, his absence does not constitute a violation of due process.[9]

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[9] In a number of cases relatively similar to the present case, the court has found no violation of due process. See Lowery v. Cardwell, 575 F.2d 727, 729 (9th Cir. 1978) (purely procedural matters discussed during an off-the-record

DENIAL OF CONTINUANCE

On the second and last morning of trial, one of Veatch's three attorneys received word that his father had died during the night. Veatch moved for a continuance so that the attorney could return home and make the necessary arrangements. Concluding that this was not a complex case and there were two competent counsel remaining, the district court denied the motion. After a brief recess, the attorney decided to remain in the trial and participated with his two defense colleagues in closing arguments.

It is well established that the granting or denying of continuances lies with the

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conference held in chambers); Polizzi v. United States, 550 F.2d 1133 (9th Cir. 1976) (post-verdict interrogation of juror "in camera"); United States v. Easley, 505 F.2d 184 (9th Cir. 1974) (conference involving the scope of possible cross-examination); United States v. Williams, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857, 93 S.Ct. 140, 34 L.Ed.2d 102 (1972) (side bar conference at trial); Stein v. United States, 313 F.2d 518 (9th Cir. 1962), cert. denied, 373 U.S. 918, 83 S.ct. 1307, 10 L.Ed.2d 417 (1963) (evidentiary hearing in chambers where the district judge granted the defendant's motion to suppress).

In Olney v. United States, 433 F.2d 161 (9th Cir. 1970), the defendant alleged that he was deprived of his right to a fair trial because he was not present during the hearing of a pretrial motion to suppress evidence. Although not expressly deciding whether a defendant is entitled to be present at a pretrial suppression hearing, the court did hold:

sound discretion of the trial judge and will only be disturbed upon a showing of clear abuse. United States v. Ortiz, 603 F.2d 76, 78 (9th Cir. 1979), cert. denied, 444 U.S. 1020, 100 S.Ct. 678, 62 L.Ed.2d 652 (1980); United States v. Mills, 597 F.2d 693, 698-99 (9th Cir. 1979); United States v. Michelson, 559 F.2d 567, 572 (9th Cir. 1977). Actual prejudice to the defendant must be shown before the denial of a continuance will be reversed. United States v. Hernandez, 608 F.2d 741, 746 (9th Cir. 1979); United States v. Petsas, 592 F.2d 525, 527 (9th Cir.), cert. denied, 442 U.S. 910, 99 S.Ct. 2824, 61 L.Ed.2d 276 (1979); United States v. Lustig, 555 F.2d 737, 744 (9th Cir. 1977), cert. denied, 434 U.S. 1045, 98 S.Ct. 889, 54 L.Ed.2d 796 (1978).

Veatch contends that the severe emotional consequences of the death of an

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> "On this record, however, we need not decide to what extent, if at all, a defendant is entitled to be present at a pretrial hearing of this type. We have reviewed the record of the pretrial hearing and have concluded that appellant's rights were well protected by his counsel. We fail to see how his rights could have been better protected by his presence. As this court has stated in a similar context, '[t]he presence of a defendant must bear a reasonably substantial relationship to the opportunity to defend.' Thus, while we do not decide whether appellant had a constitutional right to be present, it is clear that his absence, if erroneous, was harmless beyond a reasonable doubt."

433 F.2d at 163 (footnotes omitted).

immediate family member would render counsel in a criminal case ineffective. Veatch, however, doesn't point to any specific prejudice suffered other than the brevity of the attorney's final summation to the jury. Veatch ignores the fact that his other two attorneys also gave closing arguments and there is no indication that all three arguments failed to fully explore all facts and issues related to the case. As this court stated in Lustig, supra, 555 F.2d at 744, quoting United States v. Mardian, 546 F.2d 973, 979 n.9 (D.C.Cir.1977): "[A] defendant's right to an attorney of his choice is not so absolute as to permit disruption of the fair and orderly administration of justice when another competent attorney is available to continue the defense."

Based upon the record which shows that Veatch was not prejudiced by the denial, we hold that the trial judge did not abuse his discretion in refusing to grant a continuance.

AFFIRMED.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
	)	No. 80-1567
V.	)	
	)	ORDER
RONALD E. VEATCH, Appellant.	)	

Appeal from the
United States District Court
District of Arizona

Before: KILKENNY and SNEED, Circuit Judges, and GRANT, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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*The Honorable Robert A. Grant, Senior Judge, United States District Court for the Northern District of Indiana, sitting by designation.